# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Mauve

**Respondent:** Consolidated Nickel Mines Limited

**Heard at:** London Central (remote hearing) **On:** 7, 8 May 2024

**Before:** Employment Judge B Smith (sitting alone)

**REPRESENTATION:**

**Claimant:** Mr Williams (Counsel)
**Respondent:** Ms Arya (Counsel)

# PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

1. The Employment Tribunals (England and Wales) have territorial jurisdiction to determine the claim for unfair dismissal.

2. The claim for unfair dismissal shall proceed.

# REASONS

**The claim and the issues**

1. The respondent is part of a portfolio of companies managed by various investment funds. The claimant is a partner within the funds and also a shareholder and a director of Plinian Capital Limited ('Plinian'). The respondent describes Plinian as the funds' investment advisor. The

claimant describes Plinian as having the business model of acquiring distressed mining companies with the intention of recovering them and selling for a profit. The respondent operates an underground nickel mine in Zambia through a wholly owned local subsidiary named MRL.

2. The claimant started his engagement with the respondent from 17 May 2019 or later September or early October 2019. However, the claim form clearly identifies the start date of employment as being 14 October 2019. The relationship was formally recorded in a service agreement dated August 2020.

3. The claimant says his role from 17 May 2019 to 28 July 2019 was as interim CEO and he was appointed as CEO in October 2019. The respondent's written case suggests that this was an interim post although their position evolved during the hearing. The respondent says that the claimant's role involved managing approximately several hundred people who worked at the mine and overseeing the running of the plant and machinery and several other departments such as finance and HR. The respondent says that the claimant's role did not require him to work outside of Zambia or at the respondent's London office. There is a dispute between the parties as to how best to characterise the claimant's role.

4. It is common ground that nature of the claimant's work included, between 2019 and 2021, overseeing the recovery of the mine's financial position from a position of insolvency to profit. The respondent disputes the extent to which the claimant was successful in his role.

5. The claimant was dismissed on 6 March 2023 without notice. The claimant brings a claim for unfair dismissal. The reason for dismissal is said to be unclear and will need to be determined in the future. The dismissal letter is said to be, at best, ambiguous. The respondent says that the reason for dismissal was a combination of performance and conduct reasons, due to a lack of accurate communication on his part and the respondent's loss of confidence in his ability to make the mine perform, and act as an effective leader. They say this is a fair reason or alternatively some other substantial

reason. The respondent also says that it had serious concerns about the claimant's performance, including about the extent of reporting to the Board. The respondent says it was clear to the Board that the claimant was failing to carry out his duties as CEO.

6. It is also said that there was a disagreement between the claimant and Mr le Tonqueze, a director of the respondent, from January 2023 about whether or not fund partners working in an investment company should accept salary sacrifice and the sourcing of the administration budget entirely from the respondent. There were other financial and operational disagreements between the claimant and the respondent. The claimant says that parts of the disagreement included whether his salary should be deducted from future distributions of the fund. A new structure is said to have been proposed by the respondent on 18 February 2023 which the claimant disagreed with. Following the disagreement, the question as to whether or not the claimant should resign is said to have been raised by the respondent.

7. The respondent, through its grounds of response, says that the Employment Tribunals have no territorial jurisdiction to determine the claim. This is because it says that the claimant's role was, in practice, based in Zambia. The respondent says that over 70% of the claimant's working time was spent in Zambia.

8. ACAS conciliation started on 16 May 2023 and concluded on 22 June 2023. The claim was presented on 21 July 2023. By order of Employment Judge Coen dated 6 November 2023 a two-day preliminary hearing in public was listed to deal with the issue of whether the tribunal has jurisdiction to consider the claimant's claim for unfair dismissal.

**The hearing, documents, and procedure**

9. The parties agreed on the appropriate procedure at the start of the hearing. No adjustments were requested or required. Both parties are represented by solicitors and counsel.

10. The agreed documents were as follows:

    (i) Index to the bundle for the hearing 7 & 8 May 2024;

    (ii) Bundle for the hearing 7 & 8 May 2024 (189 pages);

    (iii) Index to the agreed supplementary hearing bundle;

    (iv) Agreed supplementary hearing bundle (containing correspondence about the postponement of the hearing, previously listed for 24-25 January 2024);

    (v) Agreed Reading List;

    (vi) Claimant's Witness Statement;

    (vii) Respondent's Witness Statement (Mr le Tonqueze);

    (viii) Respondent's Written Submissions;

    (ix) Respondent's OPH Authorities Bundle;

    (x) Claimant's Written Submissions;

    (xi) Authority referred to in Claimant's Submissions;

    (xii) Claimant's Supplementary Bundle; and

    (xiii) Agreed Chronology.

11. I heard evidence under oath from the claimant and Mr le Tonqueze for the respondent. Both were cross-examined. They gave evidence from within England.

12. During the hearing counsel for the claimant confirmed that sufficient time was given for breaks as necessary.

13. Both sides made oral and written submissions. In accordance with the usual procedure of the tribunal, I read those documents I was taken to during the hearing or as referred to in the witness statements or reading list.

## Findings

14. The evidential basis for my findings of fact is the oral and written evidence adduced by the parties during the hearing. I explain my reasons only where there was a dispute of fact relevant to the issues to be considered.

15. As a general observation, for the relevant points, I accepted the evidence of the claimant. This is because his evidence was, at times, clearly consistent with the documentary evidence and was not clearly undermined through cross-examination. There was no other clear reason to doubt his oral evidence.

16. I gave the evidence of Mr le Tonqueze less weight, however. This is because he admitted during cross-examination that that there were mistakes in his witness statement, such as in referring to the claimant as 'interim' CEO throughout. This is relevant because the nature of the claimant's role was in dispute and is partly relevant to the determinations I have to make. Also, I had a concern that Mr le Tonqueze's evidence included general statements which were of significance to the issues which were not entirely supported by the documentary evidence or wider circumstances. For example, his written evidence included that the claimant's role was '*that in effect he would be the equivalent of a general manager of MRL overseeing the Mine's operations'.* However, under cross-examination, when Mr le Tonqueze suggested that his characterisation was correct, he justified this by suggesting that it was because the claimant was not carrying out other CEO-type activities such as preparing for a corporate listing or other matters related to finance. However, his justification was undermined by the fact that the company was not actively preparing for a corporate listing at that stage. Also, there is documentary evidence to suggest that in fact the claimant was involved the wider financial position, at least to a degree, as indicated by board minutes dated 21 September

2020. Also, Mr le Tonqueze's oral evidence included that the '*the parties agreed that Mr Mauve would work the majority of the time onsite at the Mine'* although there is no clear documentary evidence to support such a general and widespread statement, and the position is significantly more nuanced that his oral evidence would suggest once the entirely of the evidence is taken into account, not least the written terms of the claimant's employment contract. This is because, in part, the claimant clearly had the liberty to conduct his role from the UK at relevant times, such as indicated in email correspondence such from the claimant to Mr Xiong dated 8 March 2022. This stated '*I had planned to spend a lot more time working from home in 2022, but was not satisfied with value chain stability in January and beginning February – particularly with the fleet – and therefore elected to spend a bit longer on site. Going forward I will be alternating between the UK and site, while targeting two moth stints on the mine to limit travel, with more focus on trying to grow the company and improve margins.'*

17. The respondent is a company registered in England. It operates an underground nickel mine in Zambia through a wholly-owned subsidiary ('MRL'). Throughout the relevant period the claimant lived in England. The claimant acted as interim CEO of the respondent for at least the period 17 May 2019 to 28 July 2019 whilst another individual was being considered for the position. The claimant was appointed as CEO in October 2019. His role was as 'full' CEO. This is because of announcements made by the company at the time which are clearly documented and can be found in the supplementary bundle.

18. I do not accept the respondent's characterisation of the claimant's role as being effectively the general manager of the mine. This is because I prefer the claimant's evidence on this point to the respondent's evidence. In addition to the more general points made above, I accept the claimant's evidence that general manager is a distinct role required by (at least) the local law in Zambia. Also, the documentary evidence, including board meeting notes, clearly identifies the named general manager for various periods for the mine. The claimant's role was as 'full' CEO and was not equivalent to the general manager. However, concerns about the

operations of the mine, significant debt levels and local corruption did mean that the claimant's role, particularly at the start, was very hands on.

19. The parties signed a service agreement in August 2020 with a commencement date of 14 October 2019. As accepted by the respondent's witness, this was an individually negotiated document for the specific role. Mr le Tonqueze accepted in cross-examination that it was not a standard document due to its contents.

20. In particular:

(i) clause 29 specified that English law was the governing law;

(ii) clause 30 gave exclusive jurisdiction over any disputes in connection with the agreement to the English courts;

(iii) clause 4 puts regulatory obligations on the claimant, as CEO, such as compliance with The Companies Act 2006, the Market Abuse Regulation (596/2014/EU);

(iv) clause 5 states that: *Your normal place of work will be 180 Piccadilly, London … or such other place within London which we may reasonably require for the proper performance of your duties. You shall not be required to work outside the United Kingdom for any continuous period of more than one moth at any one time. However, you agree to travel on any Group Company's business (both within the United Kingdom or abroad and in particular Africa) as may be required for the proper performance of your duties under the Appointment;*

(v) clause 7 stated that the claimant's salary is denominated in US dollars but is paid in sterling;

(vi) clause 8 states that reasonable expenses shall be reimbursed;

(vii) clauses 6, 14 and 17, make reference to English employment law protections, such as the Working Time Regulations 1998 and the

possibility of bringing protected disclosure detriment claims under the ERA 1996 (whistleblowing);

(viii) clause 15 provides for a waiver of rights under the Copyright, Designs and Patents Act 1988; and

(ix) clause 11 provides that an additional day of holiday for each period of 3 consecutive days during which duties are performed outside of the UK.

21. I am satisfied that these reflected the reality of the situation. This is because there is insufficient evidence to demonstrate otherwise. Spending a significant amount of time away from the UK is insufficient to do this.

22. The claimant was dismissed without notice by email on 6 March 2023.

23. I find that claimant spent a significant amount of his time in Zambia during his employment. However, I accept his oral evidence that this was for a much greater time than had been intended at the commencement of his employment. This is because he only became fully aware of the difficulties at the time which needed to be addressed, including very significant staffing changes and concerns about local corruption, after his appointment. Also, I accept the claimant's evidence that travel restrictions arising from the Covid-19 pandemic in both the UK and Zambia also resulted in him spending more time in Zambia than had been intended.

24. The claimant is a UK citizen and he lived in England throughout his employment, despite spending a significant amount of that time abroad. His immediate family, including wife and children, lived in England during this time and it is where his home was. The claimant was taxed on a PAYE basis (both income tax and national insurance) and was paid in sterling throughout his employment consistent with his contract. The claimant's holiday was also, as set out above, calculated in part on the basis of the amount of time spent working away from home.

25. The claimant is also properly characterised as being 'UK-based' for at least the years 2022 and 2023. This was, effectively, accepted by the respondent's witness through cross-examination. This is also supported by the respondent's own documentation in respect of leave calculations which described him as being 'UK-BASED' in those years. The claimant had started to spend more time in England since November 2021.

26. The respondent's office was at the relevant times at 180 Piccadilly, London. The building was shared with other companies. At first, the respondent leased office space. This decreased in size over time. During and after the Covid-19 pandemic the company kept the address and shared reception facilities, with the ability to hire board rooms for meetings as required, but otherwise switched to a virtual office. The claimant therefore worked from his home office when in the UK. These findings are because of the unchallenged oral evidence of the claimant on this issue.

27. The claimant's flights to and from Zambia were paid for as travel expenses by the respondent. In Zambia, he generally stayed in a single room provided by the respondent at the mine cap with institutional mine catering. On occasions he needed to stay in hotels in city locations. These findings, again, are because of the unchallenged oral evidence of the claimant. I find that the circumstances of the claimant's living arrangements in Zambia are inconsistent with it being regarded as his home.

**The law**

28. I took into account the statutes and caselaw referred to in both parties' written submissions. It would be disproportionate to list every case in this decision. This is, in part, because the determination is highly fact specific and the authorities which were adduced purely as a demonstration as to how other Courts and Tribunals have addressed a particular factual position are of limited value and acted only as a guide. I also considered *British Council v Jeffery* [2018] EWCA Civ 2253 at the respondent's request in reply to an issue raised by the tribunal.

29. The claim for unfair dismissal is made under the Employment Rights Act 1996 ('ERA 1996'). The ERA 1996 does not (now) specify its territorial extent. This has been developed through decisions of the courts. The decision is one of my judgment and involves taking into account various factors, none of which is determinative.

30. In *Lawson v Serco* [2006] UKHL Lord Hoffman held that the standard case of an employee working in Great Britain falls within the territorial scope of the ERA 1996. He also identified that peripatetic employees whose base is in Great Britain are included, even if they spend months working overseas. For expatriate employees something more is necessary. Lord Hope stated at [28] that

'*It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain require an especially strong connection with Great Britain and British employment law before an exception can be made for them'.*

31. *Duncombe v Secretary of State for Children, Schools and Families* (No 2) [2011] ICR 1312 identifies as a principle that the question, for employees working or based abroad, is whether the employment has much stronger connections both with Great Britain and with British employment than with any other system of law. Relevant factors include where the employer is based, the governing law of the contract, and where taxes were paid. Notwithstanding the wording of s.204 ERA 1996, it was confirmed by the Court of Appeal in *Jeffrey* (for example, at [61] onwards) that *Duncombe* correctly identifies the governing law of the contract as a relevant factor.

32. In *Ravat v Halliburton Manufacturing & Services Ltd* [2012] ICR 389 the Supreme Court held that (per Lord Hope):

*[27] I agree that the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works.*

*The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.*

*[28] The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them.*

*[29] But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree. The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous. Mr Cavanagh said that a rigorous standard should be applied, but I would not express the test in those terms.*

33. It follows that a less onerous burden falls on a claimant who has his home in Great Britain. *Bates van Winkelhof v Clyde and Co* [2013] ICR 883 CA confirms that the comparative exercise of showing a stronger connection to Great Britain than another country is unnecessary in those circumstances. The comparative exercise will be appropriate where the applicant is employed wholly abroad but this is not necessary where the applicant lives and or works for at least part of the time in Great Britain (at [98] *per* Elias LJ). All that is required is that the '*tribunal should satisfy itself that the connection is .. ''sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim.'"*

34. If the nature of the employment evolves over time, the tribunal must identify when the territorial jurisdiction of the ERA 1996 extends to a claimant: *Partners Group (UK) Ltd v Mulumba* UKEAT/0237/20/RN.

**Submissions**

35. It is proportionate only to summarise the arguments made. The claimant's case is that his connections were sufficiently strong to Great Britain for territorial jurisdiction to be established, and the less onerous burden of an international commuter-type case applies because he was not a true expatriate. This is because the claimant lived in the UK for the relevant period, albeit with some significant periods of time away from home. Alternatively, the higher standard is also met on the facts of this case. The respondent invites me to apply the higher standard, and relies on the amount of time spent in Zambia, and the operational needs of the mine, to reject the claimant's arguments.

36. The four (summary) reasons originally advanced by the respondent were that (a) the appointment at the mine was with a view to being the *de facto* general manager of the mine, (b) the claimant's role required him to work in Zambia at the mine or on matters related to the mine, (c) the essential work was done in the mine in Zambia and he spent substantial periods of his employment in Zambia to that end, and (d) travel back to the UK during the period of employment was limited.

**Conclusions**

37. I have decided that the issue of territorial jurisdiction should be determined in the claimant's favour. The claimant's connections to Great Britain are very, and sufficiently, strong. This is because:

    (i) The claimant lives in Great Britain;

    (ii) The claimant has British citizenship;

    (iii) The respondent employer is incorporated and based in Great Britain;

    (iv) The claimant's contract of service is governed by English law;

    (v) The contract contained an exclusive jurisdiction clause for the English courts;

(vi) The claimant's contract provides for English statutory employment rights, and he was bound by English statutory obligations;

(vii) The claimant was taxed in Great Britain for both income tax and national insurance;

(viii) The claimant's contract stated that his place of work was in England and travel was only as necessary. Also, the respondent accepted under cross-examination that it did not have a contractual power to keep the claimant in Zambia.

38. In my judgment, the claimant's position is much closer to that of the 'international commuter' -type case than that of the true expatriate. In fact, it cannot be said that he was a true expatriate. This is because his home was in England at all material times. In light of this conclusion, the less onerous burden identified in *Ravat,* and confirmed in later cases, applies.

39. I find that claimant's base was in England. This is because his time in Zambia, although significant at times, was largely to address specific issues which were largely unforeseen at the outset. Even when the extent of the issues was well-identified, his UK base was reflected in the employment contract which was effectively backdated. His base as a matter of contract, and reality in terms of the respondent's registration and corporate office, was in England. Also, his home was England. It is where his house and is family were. It was where he (generally) returned in so much as was possible taking into account the Covid-19 pandemic. Also, his holiday calculations were made on the basis that time spent working outside of the UK was away from home and attracted an additional holiday allowance.

40. For those reasons, I find that the claimant's connections are sufficiently strong for territorial jurisdiction to be established.

41. If I am wrong, however, and the higher burden applies, I am satisfied that the facts of this case are sufficiently exceptional, and the claimant had a significantly closer connection to Great Britain and English employment law

than any other jurisdiction. Although he spent a lot of time in Zambia, particularly at the start of his tenure as CEO, this was not consistent throughout his employment. Also, all of his connections point to Great Britain as opposed to Zambia, other than his physical location at some times. His home and family are in Great Britain. His taxes were paid in Great Britain, and it is where he is a citizen. His contract was governed by English law with jurisdiction given to the English Courts as part of a specifically negotiated contract well after he was in place. The intention of the parties was clearly that the relevant jurisdiction for disputes was England. As to exceptionality, the fact that the claimant spent a significant amount of time in Zambia was in part due to the exceptionally difficult circumstances of the mine and the effect of Covid-19. I am satisfied that the comparative exercise is in the claimant's favour and that exceptional circumstances exist such that the claim is within the territorial jurisdiction of the ERA 1996.

42. The respondent's case, at its highest, was that the claimant spent a significant amount of time in Zambia, although not exclusively there. This is insufficient to undermine my conclusions of fact or law. The submission that the claimant was the *de facto* general manager fails as a question of fact. The fact that the claimant did some work in both Zambia and the UK, the contractual position, and the position in reality, all undermine the respondent's suggestion that the essential work was done in Zambia and his role required him to work in Zambia (at least, to the extent suggested by the respondent). The respondent's submissions also fail to adequately take into account the fact that at least some of the limitations on the claimant's travel to the UK were as a result of the Covid-19 pandemic.

43. My conclusions on territorial jurisdiction are the same throughout the entire period of the claimant's employment. This is because there is insufficient evidence to make a clear finding that his employment status from a jurisdictional position had evolved. Although the amount of time the claimant spent away from the UK did vary, there is good reason for this, namely the extent of on-site work that he undertook and the impact of the Covid-19 pandemic. In light of the factual position, I do not conclude that his

employment position changed in respect of territorial jurisdiction of the ERA 1996.

44. For the above reasons, I have decided that the Employment Tribunals (England and Wales) have territorial jurisdiction to determine the claim for unfair dismissal. The claim for unfair dismissal shall proceed.

Employment Judge Barry Smith
8 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 June 2024
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FOR THE TRIBUNAL OFFICE